

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT HUNTINGTON

BILLY J. MASSIE,

Plaintiff,

v.

CIVIL ACTION NO. 3:06-0689

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

ORDER

This matter is presently pending before the Court on petition of Billy J. Massie seeking an award of attorney's fees under the Equal Access to Justice Act ("EAJA"). 28 U.S.C. § 2412. Plaintiff filed the petition following the Court's decision granting plaintiff's motion for judgment on the pleadings, reversing the Commissioner's decision and awarding plaintiff disability insurance benefits. The Commissioner opposes the petition, asserting in his brief in opposition that the petition "is untimely." In his response, plaintiff concedes that the petition was filed nine days beyond the "thirty days of final judgment" contemplated by the Act. 28 U.S.C. § 2412(d)(1)(B). Plaintiff states that the petition was late "due to clerical error" when his "office did not calendar the sixty day appeal period" following the court's denial of the Commissioner's motion to alter or amend the judgment.

It is well established that the statutory thirty day period for filing an EAJA application is not "jurisdictional," Scarborough v. Principi, 541 U.S. 401, 413-14 (2004), and the time limit has been held subject to the doctrine of equitable tolling,¹ a doctrine which, when applied "to suits against the

¹See, Wilson v. Commissioner of Social Security Administration, No. 2:05cv44, 2008 WL 2308068 (ND WV June 4, 2008).

Government,” is applied “in the same way that it is applicable to private suits” Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990). “Federal courts,” however, have “extended equitable relief only sparingly,” allowing “equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” Id. at 96. Generally, “resort to equity” is “be reserved for those rare instances where – due to circumstances external to the party’s own conduct² – it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000). Equitable tolling is not, however, extended to “garden variety claim[s] of excusable neglect,” Irwin v. Department of Veterans Affairs, supra at 96, and, as a consequence, does not extend to the “clerical error” which resulted in the untimely petition filed in this case.

On the basis of the preceding, plaintiff’s petition for an award of attorney’s fees under the Equal Access to Justice Act will be denied, and it is so **ORDERED**.

The Clerk is directed to transmit a copy of this Order to all counsel of record.

ENTER: May 29, 2009


 MAURICE G. TAYLOR, JR.
 UNITED STATES MAGISTRATE JUDGE

²And, of course, external to the conduct of a party’s counsel. Gayle v. United Parcel Service, Incorporated, 401 F.3d 222, 227 (4th Cir. 2005).